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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 449

JOSEPH STACHER,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the Southern District of California denaturalizing petitioner.

Opinions Below

The opinions of the District Court are unreported and are set forth at pages 19, 20 of the Appendix herein. The opinion of the Court of Appeals is not yet reported and is set forth at page 23 of the Appendix herein.

Jurisdiction

The judgment of the Court of Appeals was entered on July 15, 1958 (R. 1052), and a petition for rehearing was

denied on September 11, 1958 (R. 1053). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. In a denaturalization case is the principle requiring clear, convincing and unequivocal evidence applicable alike to the merits and jurisdictional fact as the Second Circuit recognizes *U. S. ex rel. Stabler v. Watkins*, 168 F. 2d 883, 885 (C.A. 2, 1948), or does it relate solely to the merits as the Court below decided?

2. Petitioner, a denaturalization defendant, was physically in the State of Nevada from 1950 through the year 1953 and spent approximately two months each year in California with his wife. She moved to California from Nevada in 1951 for climatic reasons and remained in California through 1952 and 1953 during the pregnancy of one child and pending completion of the school term of another. Under these circumstances, did petitioner, who remained in Nevada in 1953, have his residence defined as "actual dwelling place in fact" [8 U.S.C. 1101(a)(33)], in Nevada or California under the denaturalization provisions of the Immigration and Nationality Act [8 U.S.C. 1451(a)] which limits jurisdiction to denaturalize to the district of residence?

3. Is there "personal service" of a denaturalization summons and complaint as required by statute [8 U.S.C. 1451 (b)] where the defendant is absent in Nevada and the papers are left with his wife in California?

4. Is mere proof that a denaturalization defendant misstated his arrest record sufficient evidence upon which to predicate denaturalization without proof of intentional falsification?

5. Is the present denaturalization statute (8 U.S.C. 1451) unconstitutional in its retroactive removal of intentional

falsification, intent to deceive and actual deception as a basis for revocation of American citizenship?

Statutes Involved

Section 340 of the Immigration and Nationality Act of 1952 [8 U.S.C. 1451; 66 Stat. 260] provides:

> SEC. 340. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing

such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Section 338(a) of the Nationality Act of 1940 [8 U.S.C. 738-a; 54 Stat. 1137] provided:

It shall be the duty of the United States district attorneys for the respective districts, upon affidavits showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such persons to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

28 U.S.C. 1391 (b) provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside.

Rule 4 (e) of the Rules of Civil Procedure provides:

> (e) Same: Other Service. Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

Statement

(A) *Jurisdiction*

Denaturalization proceedings under the 1952 Immigration and Nationality Act [8 U.S.C. 1451(a)] were instituted on February 2, 1953, in the District Court for the Southern District of California against petitioner, a veteran of World War II (R. 3, 11, 677). The applicable statute, like its predecessors, requires personal notice of the complaint where service is made within the court's jurisdiction. However, if a defendant be *absent* from the district of his residence such notice is to be given either by "personal service *upon him* or by publication in the manner provided for the service of summons by publication or upon absentees" by state law. On February 3, 1953, a copy of the summons and complaint herein were left with petitioner's wife in Beverly Hills, California (R. 657-659). It is undisputed that petitioner was then in Las Vegas, Nevada (R. 802) and that he was never served there either personally or by publication.

In 1950 petitioner left New Jersey and came to Nevada where he remained through the year 1953. His only absences from Nevada during this period were a two months' visit to Palm Springs, California, and visits of not more than two months annually to Beverly Hills, California [R. 1039-1043, footnotes 11(a), (e)-(g), 12 (j), (a)(a)]. Petitioner's wife came with him in 1950 from New Jersey to Nevada. To avoid the cold in Reno she proceeded to Palm Springs where she became pregnant. Upon advice of her physician she remained in California where a Beverly Hills apartment was leased in her and her husband's name. She remained in Beverly Hills following the birth of the child on September 8, 1952, to await the completion of her older son's school term. (R. 14-17, 24-33.) Petitioner, however, remained in Nevada, successfully resisting in habeas corpus proceedings extradition to New York on a gambling charge (R. 253-258).

A motion to quash the purported service herein (R. 12) was denied on the ground that service upon petitioner's wife in California was service upon him, although he was then in Nevada (R. 175, 208, 892). The Court of Appeals predicated jurisdiction to denaturalize, not upon absence or presence in California, but upon a finding that the preponderance of the conflicting evidence supported a finding that petitioner resided in California on February 2, 1953.

(B) *The Merits*

The judgment of the District Court denaturalizing petitioner on September 13, 1956, revoked American citizenship granted to him by the District Court in New Jersey on May 12, 1930 (R. 206, 208). The denaturalization judgment herein is predicated on concealment of material facts and willful misrepresentation under Section 340-a (8 U.S.C. 1451-a) of the 1952 Immigration and Nationality Act (R. 207).

Petitioner's application for naturalization in 1929 (Ex-

hibit 4, R. 435) failed to reveal six arrests which resulted in dismissals and one $50.00 fine for simple assault (R. 435). Petitioner, a person of limited reading ability and education in 1929 (R. 367, 662, 665) authorized an interpreter, Kemeny, who assisted aliens, to prepare his citizenship application (R. 668, 361-373). Kemeny did so upon the basis of information supplied by petitioner's sister that he had no criminal record (R. 539, 361-373, 386). Upon assurance of Kemeny that the form was properly prepared, petitioner signed it in Heck's Restaurant in Newark without reading it (R. 669-670). A witness, a county detective, present at the time verified this occurance (R. 382-386). The naturalization examiner in the instant case, W. E. Braden, had no specific recollection of petitioner nor of this 1930 naturalization proceeding (R. 441, 445, 968). He was, however, permitted to testify over objection (R. 1011, 1015-1017) that his invariable practice in 1930 was to ask naturalization applicants and their witnesses whether they were arrested and convicted (R. 450, 453, 468). Petitioner (R. 674) and several naturalization applicants and witnesses who had appeared before Braden testified that this purported invariable practice was not followed in their cases (R. 885, 895, 905, 920, 937, 948).

The District Court throughout the trial indicated that the crux of the case was whether petitioner misstated his arrest record. No attention was given to intentional falsification. The trial judge reiterated:

> "* * * my understanding is that a person who misrepresents such a fact that is all that is necessary, regardless of whether the arrest record would have disclosed anything or not." (R. 429.)
>
> "And the case boils itself down to one issue and that is whether or not at the time he filed his petition for naturalization he made truthful statements as to his arrest." (R. 430.)

"It is my understanding we were going to confine this case to the question of whether he was asked had he ever been arrested and convicted and whether or not his answer to that question was true or false." (R. 501.)

"If you can prove that he made a misstatement as to his previous arrests that is all you have to prove." (R. 524.)

"It does seem rather harsh but I am convinced and I believe that I can find by clear and convincing evidence that Mr. Braden's testimony is true. * * * he (petitioner) had been arrested before his naturalization proceeding and he did not in answering the questions asked by the naturalization examiner answer truthfully. He answered 'no' when that was not the truth." (R. 803.)

Upon the basis of Braden's testimony and his office practice in 1930, the District Court decreed denaturalization (R. 204) and the Court of Appeals (R. 1048) affirmed.

In addition, the Court of Appeals ruled that jurisdiction to denaturalize might be predicated upon a finding that the preponderance of the evidence established petitioner's California residence and that, unlike other denaturalization issues [see *Knauer v. United States*, 328 U.S. 654 (1945)] the District Court's findings on this issue could not be disturbed unless clearly erroneous (R. 1039-1041).

Reasons for Granting the Writ

1. The instant case poses an important jurisdictional problem requiring delineation by this Court in view of the increasing number of denaturalization cases presently the subject of judicial action. Indeed, the District Court herein acknowledged that it was a question deserving of appellate review (R. 801).

At a time when petitioner was physically present in Nevada (R. 801-2) service of the summons and the complaint in this denaturalization action was made by leaving a copy of such papers with petitioner's wife in California (R. 802). Such service was sustained both by the District Court and by the Court of Appeals. The latter whittled away the doctrine that denaturalization cases must meet the exacting standard of clear, convincing and unequivocal proof—proof that does not leave the issue in doubt. *Novak* v. *United States*, 356 U.S. 660, 663 (1957); *Maisenberg* v. *United States*, 356 U.S. 670, 672 (1957); *Schneiderman* v. *United States*, 320 U.S. 118, 158 (1943); *Baumgartner* v. *United States*, 322 U.S. 665, 675 (1944). Instead of applying this test to the Government's entire case, the Court of Appeals reasoned that it was applicable solely to the merits and not to the jurisdictional issue (R. 1039). This dichotomy finds no support in this Court's opinions. Moreover, this novel doctrine is in conflict with the views of the Second Circuit. In *U. S. ex rel. Stabler* v. *Watkins*, 168 F. 2d 883, 885 (C.A. 2, 1948), Judge Swan, speaking for the Second Circuit, stated:

> "In *Schneiderman* v. *United States*, 320 U.S. 118, the court ruled that citizenship 'once conferred should not be taken away without the clearest sort of justification and proof'. While it is true that Justice Murphy was there referring to proof concerning the merits of the controversy, not to proof as to jurisdictional facts, we can conceive of no reason for accepting less clear proof as to the court's jurisdiction."

This conflict between circuits interpreting this Court's important denaturalization principle of strict proof requires clarification by the Supreme Court.

2. The decisions below interpret the term "residence" contrary to *Savorgnan* v. *United States*, 338 U.S. 491, 504

(1950) and the express language of Section 101(a)(33) of the Immigration and Nationality Act [8 U.S.C. 1101(a)(33)] incorporating that interpretation. According to the denaturalization statute (8 U.S.C. 1451-a) and the decisions below (R. 801 *et seq.*, 1038 *et seq.*) California residence was essential to jurisdiction of the District Court in California to denaturalize petitioner. However, the *Savorgnan* case and Section 101(a)(33) define residence as "actual dwelling place in fact, without regard to intent". These definitions control the meaning of residence in the denaturalization section of the Immigration and Nationality Act but they failed to control the decisions below.

The alleged conflicting evidence as to petitioner's California residence is summarized in footnotes 11 and 12 of the Court of Appeals opinion (R. 1039-1043). As that opinion reveals, from June 17, 1950, through April of 1954 petitioner's "actual dwelling place in fact" was Nevada and not California. During this period he remained in Nevada except for a two months' visit to Palm Springs and visits of about two months each year to Beverly Hills, California. In the face of these admitted facts, the District Court supported a finding of residence in California because petitioner's wife was there and because petitioner

> "is a family man and is very closely tied to his family and that relationship between husband and wife was very close." (R. 802)

The Court of Appeals found the evidence on residence in conflict but refused to reverse upon this record. However, the evidence is not in conflict as the undisputed facts accepted by the Court of Appeals demonstrate that petitioner's "dwelling place in fact" and therefore his residence was in Nevada.

If the term "residence" is to have a uniform meaning throughout the statute, applicable alike to naturalization,

denaturalization and expatriation, as was intended by Section 101(a)(33), then the decision below cannot stand. Because of the conflict with this Court's decision and because of the importance of this issue, certiorari is approproiate.

3. The decisions below predicate jurisdiction to denaturalize an absent defendant upon a finding that a mere preponderance of the evidence established California residence. It is not disputed that petitioner was in Nevada when his wife received the denaturalization papers herein in California (R. 801-2). Overlooked by the Courts below is the fact that jurisdiction over petitioner may not be thus obtained even if he were a California resident on the commencement date of this litigation.

Section 340(b) of the Immigration and Nationality Act [8 U.S.C. 1451(b)] specifically requires that if a denaturalization defendant be absent from the judicial district of his last residence (as the Courts below found here) then he must either be *personally served* with the summons or served by publication. Section 340(b) reads as follows:

> "The party to whom was granted the naturalization * * * shall in any such proceedings under subsection (a) of this section, have sixty days' personal notice * * * and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence such notice shall be given either by personal service upon him or by publication * * *."

Petitioner was absent from California and was not served by publication. The only way he could be served was "by personal service upon him". Under Rule 4(e) of the Federal Rules of Civil Practice, service outside the jurisdiction of a Federal court is controlled by the relevant statutory provisions of the denaturalization section of the Immigration and Nationality Act. The statutory requirement therein

of personal service is a requirement that service be made by personal delivery of the summons and complaint to the defendant. This is the ordinary connotation of the term "personal service". *Martin* v. *Better Taste Popcorn Co.*, 89 F. Supp. 754, 756 (S.D. Iowa, 1950). Here, it is reinforced by the limitation that personal service be made "upon him", i.e., the denaturalization defendant and not by personal service upon others. It is further reinforced (a) by the due process requirement that the best method of service be utilized, *McDonald* v. *Mabee*, 243 U.S. 90 (1917); *New York* v. *New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953), and (b) the strict construction applicable to the statute here under consideration.

Service outside the state and outside the jurisdiction of the court is a method of service in derogation of the common law and must be strictly construed. *Galpin* v. *Page*, 85 U.S. 350, 369 (1874); *United States* v. *Sotis*, 131 F. 2d 783 (C.A. 7, 1942); *United States* v. *Kiriaze*, 172 F. 2d 1000 (C.A. 5, 1949); *U. S. ex rel. Volpe* v. *Jordan*, 161 F. 2d 390 (C.A. 7, 1947). Obviously, leaving a summons and complaint with others at a person's last residence is not the best method of service when it is possible and convenient to hand him the denaturalization papers personally in a nearby state. In fact, such was the procedure followed in the denaturalization proceedings against *Frank Costello* (Civil Action No. 79-309, S.D. N.Y.). During his incarceration in Atlanta, litigation was instituted in New York. Personal delivery of the denaturalization papers were made upon Costello in 1952 at Atlanta, Georgia. Objection was made to this service upon the ground that the 1940 statute [8 U.S.C. 738(b)] only authorized service outside the state by publication. Service was subsequently made by publication to avoid a jurisdictional controversy. We believe that the new provision of the 1952 Act which now authorizes

personal service outside the Court's jurisdiction was intended to remedy the defect revealed in the *Costello* case.

The instant case presents for the first time the interpretation of the new denaturalization provision authorizing "personal service" outside the Court's jurisdiction. This interpretation will be important to the administration of our denaturalization statute and in the many future citizenship revocation cases where service is to be made outside the Court's jurisdiction.

4. Throughout the denaturalization hearing, the District Court stressed that the single issue was whether petitioner misstated his arrest record in the naturalization proceedings (R. 429, 430, 501, 524, 803). Neither the District Court nor the Court of Appeals reveal any analysis or indication that clear and convincing evidence establish that petitioner *intentionally* or *willfully* misstated his arrest record. The absence of this element precluded denaturalization in *Novak* v. *United States*, 356 U.S. 660, 663 (1957) and *Maisenberg* v. *United States*, 356 U.S. 670, 672 (1957). The District Court ruling below rendered prior to these decisions, does not conform to them.

The District Court as did the Court of Appeals, relied exclusively upon the testimony of naturalization examiner Braden. Braden testified in 1956 that he had no recollection of petitioner's 1939 naturalization case (R. 441, 445, 968), that it was the practice to then ask whether an applicant had been arrested *and* convicted (R. 450, 453, 468) and that he had noted on the naturalization application "No Arr." which meant "no arrests" (R. 460). Petitioner, a person of third grade education (R. 662, 665), utilized the services of an interpreter, Kemeny, to execute his naturalization application (R. 668, 361-373). The interpreter understood, upon the basis of information supplied by petitioner's sister, that he had no arrest record (R. 361-373). Kemeny ap-

peared as a witness at petitioner's naturalization examination (R. 281). Did petitioner testify before Braden through Kemeny, through some other interpreter, or attempt to speak with his limited understanding in English? Did petitioner believe (as many laymen do) that he had no arrests *and convictions*, because his record merely consisted in a single $50 fine? The evidence on these subjects is wanting.

The Court of Appeals acknowledged the existence of:

> "difficulties inherent in proving in 1956 what happened in 1930, including the absence of certain witnesses." (R. 1045.)

The testimony of naturalization examiner, Braden, was erroneously given controlling weight by the Courts below. He had no recollection of this naturalization proceeding. His testimony as to custom or practice in 1930 did not establish what actually occurred herein. *Cufari* v. *United States*, 217 F. 2d 404, 406 (C.A. 1, 1954); *Smallfield* v. *Home Insurance Co. of New York*, 244 F. 2d 337, 340 (C.A. 9, 1957); *Masters* v. *United States*, 229 F. 2d 677 (C.A. 6, 1956); *Barry* v. *Hall*, 98 F. 2d 222, 228 (C.A. D.C. 1938). Custom or practice, where admitted to establish what occurred in a specific instance, must meet exacting standards—standards not met here. To be admissible or have weight the custom should be one that existed a long time and it should be established by clear and satisfactory evidence of instances of actual practice and not be merely the opinions of witnesses. *U.S. Shipping Board Emergency Fleet Corp.* v. *Levensaler*, 290 Fed. 297 (C.A. D.C., 1923); *Parkway Baking Co.* v. *Friehofer Baking Co.*, 255 F. 2d 641, 647 (C.A. 3, 1958). The only proof of actual instances here was evidence that the alleged custom was not followed (R. 674, 885, 895, 905, 920, 937, 948).

Nevertheless, the District Court considered Braden's weak and inadmissible testimony as to custom, mingling it with his statement that his "No Arr" notation meant that the question had been asked. What weight the Court would have given this notation without the evidence as to custom is speculative. *Bridges* v. *Wixon*, 326 U.S. 135, 156 (1944); *Alexiou* v. *McGrath*, 101 F. Supp. 421, 424 (D.C. Dist. of Col. 1951). Moreover, the notation "No Arr" means "no arrests" (R. 469). Braden, obviously, concluded that petitioner had no arrests. Whether petitioner supplied this information or whether Braden secured it from petitioner's naturalization witnesses alone (R. 466) or from the naturalization form (Exhibit 4) which the interpreter, Kemeny, filled out can not be determined apart from the deficient custom evidence herein. Accordingly, there only remains a misstatement in a naturalization form filled out by Kemeny and executed by petitioner. Intentional falsification or willful misrepresentation can no more be deduced here than in the case of an incorrect income tax form prepared by an accountant, *Davis* v. *Commissioner of Internal Revenue*, 184 F. 2d 86, 87 (C.A. 10, 1950). The denaturalization of petitioner without clear and convincing evidence of intentional falsification and contrary to the *Maisenberg* and *Novak* decisions of this Court, warrants the grant of certiorari.

5. It has been assumed that denaturalization can only be supported herein by clear and convincing evidence of intentional falsification.

Under the 1952 Immigration and Nationality Act, which is here involved, fraud and illegality are eliminated as grounds for denaturalization and concealment of a material fact or willful misrepresentation are substituted, 8 U.S.C. 1451(a). Willful misrepresentation requires intentional falsification, *Heikkinen* v. *United States*, 355 U.S. 273, 279

(1957). However, the analysis [1] of the General Counsel of the Immigration Service of the bills [2] which became the 1952 Act reveals that the denaturalization provision authorizing revocation of citizenship for concealment of a material fact was intended to eliminate scienter. If petitioner has been denaturalized for an unintentional misstatement, and we submit that he has been, substantial questions of statutory construction and constitutional law are presented.

Strict construction of this denaturalization statute, *Schneiderman* v. *United States*, 320 U.S. 118, 158-159 (1943), would indicate that it should be construed to require an intentional concealment. This is the implication of the Court of Appeals decision (R. 1051). However, that Court erroneously equates "fraud" of the prior statute with "concealment" of the present one. The changed wording of the statute was purposeful—to make it easier to denaturalize by omitting some of the elements of fraud (S. Report 1515, 81st Cong., 1st Sess., p. 769; S. Report 1137, 82nd Cong., 2nd Sess., p. 45). Fraud may include concealment, as the Court of Appeals decision observes, but concealment, which does not require deception and may not include scienter, is hardly coextensive with fraud. Moreover, as the District Court repeatedly observed, this case was not tried on any theory of fraud but merely on the basis that petitioner misstated his arrest record (R. 429, 430, 501, 524, 803). It was tried under the 1952 statute and not under the prior one. Withal the Court of Appeals fails to analyze or point to any supporting evidence here establishing the constituent elements of fraud including those of scienter, intent to deceive, or deception. *Boatmen's Nat. Co.* v. *M. W. Elkins & Co.*, 63 F. 2d 214, 216 (C.A. 8, 1933); *United States* v. *Anastasio*, 226 F. 2d 912 (C.A. 3, 1955).

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[1] On file in the Supreme Court Library and in the Solicitor General's Office.

[2] Section 339(a) of S. 3455, 81st Congress, 1st Session.

Petitioner had the priceless right of American citizenship subject to defeasance only for illegality or intentional falsification. The elimination of these grounds and the substitution of an unintentional misstatement as a ground for denaturalization authorized citizenship loss retroactively upon a basis not existing before. A statute retroactively creating liability or a cause of action deprives a person of property without due process of law. *Danzer Co.* v. *Gulf & Ship R. R. Co.*, 268 U.S. 633, 637 (1924); *Beazell* v. *Ohio*, 269 U.S. 167, 170 (1925). Retroactively creating a cause of action for loss of citizenship violates constitutional guarantees. Construction of the changed language of the denaturalization section in the light of its legislative analysis by the Immigration Service and the constitutional problem it raises, present a substantial question requiring Supreme Court review.

Conclusion

The jurisdictional, statutory and constitutional problems presented herein by the denaturalization revisions in our 1952 Immigration and Nationality Act are issues of importance. Resolution of these issues by this Court will resolve conflicts with Supreme Court decisions, conflicts between the circuits and stabilize the course of future denaturalization proceedings.

Respectfully submitted,

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Oral Opinion of the District Court

[December 21, 1955—R. 801]

The Court: Gentlemen, I don't think it is my prerogative to set the policy of the Government to follow in these cases.

I feel that we have two points here to resolve. The first one to me is more serious than the one you argued and [404] that is the question of where the defendant resided.

I think an interpretation of that statute is going to have to be made by the Circuit Court of Appeals.

I am going to hold that the defendant did reside in this District even though he was absent for the purpose of finding a haven in Nevada. In my opinion that did not change his place of residence.

I was rather favorably impressed with Mr. Stacher. I feel he is a family man and is very closely tied to his family and that the relationship between husband and wife was very close. In fact they have this adopted child.

Defendant did move his family to Las Vegas where they lived together and his absence from California was only because he was seeking a haven from possible prosecution on an indictment from New York.

I can't help but be impressed by the argument that was made before me at the time that this motion for a transfer of this case to Nevada by counsel who preceded you.

You gentlemen were not the defendant's attorneys at that time, but they gave the most unusual reason I had ever heard of and that was "Our client cannot come to California because he is liable to be extradited from Nevada to New York, and as long as he stays in Nevada he is safe from extradition."

I cannot help but feel that his residence means abode and I think his abode was with his family and that he was [405] absent to avoid what he thought would be the processes of a New York court which afterward, when he found out that that was not true he came back to California and resumed his home here.

As to the second point, I recognize the question why there should not be and is not a statute of limitations as to when naturalization proceedings should become final and beyond question.

It does seem rather harsh but I am convinced and I believe that I can find by clear and convincing evidence that Mr. Braden's testimony is true.

I know we are going back a long time. I recognize the argument made by counsel, but I think that is a matter of policy for the Government to determine.

It seems to me as different cases have been submitted to me that most of them run back a number of years and I am going to hold that the clear and convincing evidence is that he had been arrested before his naturalization proceeding and that he did not in answering the questions asked by the naturalization examiner answer truthfully. He answered "no" when that was not the truth.

However, I might say if Government hasn't any more luck in deporting him that they have our Communist friends that he will die of old age first. I think there is a case before the Supreme Court now that has been pending, and it is a [406] deportation proceeding, which has been pending since 1934. I have had a number of cases in which deportation proceedings have been of no avail by different holdings of the court. And in any event Russia will not accept these people. There is no arrangement whereby there can be an exchange like there is between England and the United States and other countries. Deportation to Russia under the present setup is almost impossible.

So, I am going to hold as I have stated and will direct the Government to prepare judgment and findings accordingly.

MEMORANDUM OPINION OF THE DISTRICT COURT

[August 20, 1956—R. 204]

On the re-submission of this cause, I find nothing substantial to change my views that the government has proven by clear, unequivocal and convincing evidence that

the defendant under oath stated he had no previous arrests. The evidence and admissions of the defendant clearly proved that he had a prior criminal record. The only serious question raised by the defendant was a denial that he had been asked about his previous arrests. I not only have come to my present conclusions on the custom and practice of the office but also have placed great weight upon the written notation made by the naturalization examiner at the time of the application for citizenship.

The only serious questions raised by the defense, under my view of this case, are purely technical and procedural. [674] The defendant stresses the case of U. S. v. Zucca, 351 U. S. 91, and contends that the affidavit attached to the complaint is insufficient. It is difficult for me to see how an affidavit could be made stronger. Attached to the complaint is the police record from Newark, N. J. A portion of the arrests disclosed by such record and affidavit are admitted. The arrests and admissions tie in so closely that it is difficult for me to comprehend defendant's issue on this feature of the case. Good cause is not only clearly disclosed by the affidavit but discloses positive cause for the prosecution of the action. Certainly the defendant does not contend that the arresting officers should have made the affidavit.

I appreciate the fact that the Zucca case raises many questions that yet must be answered by reviewing courts. The court is not faced with the problem of whether such affidavit is jurisdictional. Inasmuch as the affidavit was filed I hold such affidavit sufficient.

My attention has been called to the numerous cases which the Supreme Court, after granting certiorari has reversed the trial court in cases of this character, but nothing is said of the many cases in which the Supreme Court has denied certiorari. It is difficult to assume that the Supreme Court intended or intends to nullify Section 340 of the Nationality Act and permit an alien, by the concealment of material facts from the naturalization examiner, to obtain priceless citizenship.

Before reopening the case for further evidence, findings of fact and conclusions of law were filed with me. I shall approve such findings upon the expiration of five days from date hereof, unless in the meantime the defendant files objections thereto. The government is directed to submit [675] forthwith any additional recitals of the further trial of this action that should be included in the findings and judgment.

Dated: This 20th day of August, 1956.

(S.) BEN HARRISON,
Judge [676]

OPINION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 15, 1958, R. 1033]

Before: CHAMBERS and BARNES, Circuit Judges; JERTBERG, District Judge.

BARNES, Circuit Judge:

This is an appeal from a judgement entered by the District Court of the United States for the Southern District of California, Central Division, revoking and setting aside an order of the United States District Court of the State of New Jersey, made on or about May 12, 1930, admitting the defendant Joseph Stacher to United States citizenship; and cancelling his Certificate of Naturalization, No. 3275913.

The judgment appealed from was entered on an amended complaint filed by the United States Attorney for the Southern District of California pursuant to Section 340(a) of the Immigration and Nationality Act of 1952 (66 Stat. 260), 8 U.S.C. § 1451 (a),[1] in which it is alleged that ap-

[1] 8 U.S.C. § 1451(a), revocation of naturalization, reads as follows in material part:

"(a) It shall be the duty of the United States attorneys for the respective districts upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation. . . . If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence. As amended, Sept. 3, 1954, c. 1263, § 18, 68 Stat. 1232."

pellant's naturalization in the New [R. 1034] Jersey District Court on May 31, 1930, was procured upon sworn statements of appellant and his allegations under oath which amounted to concealment of material facts and material misrepresentation with respect to his moral character, his use of other names and his previous arrests.

The matter was tried by the court, sitting without a jury, no jury having been requested.

The material facts concealed and the misrepresentations charged related to (1) appellant's moral character; (2) various arrests and charges of violations of law prior to January 22, 1930 (the date appellant's petition for naturalization was filed); (3) the use of names other than Gdale Oistuezer and Joe (or Joseph) Stacher (including Joe or Joseph Rosen, J. P. Harris, Doc Harris, Doc Stacher, George Kent and Harry Goldman); (4) his association with gangsters and bootleggers, and membership in the "Third Ward Gang" of Newark, New Jersey. The amended complaint charged the following "arrests and charges" which appellant had failed to disclose:

(1) November 26, 1924, for breaking, entering, and larceny;
(2) April 21, 1926, for assault and battery;
(3) August 18, 1926, for assault and battery;
(4) June 7, 1927, for atrocious assault and battery;
(5) July 11, 1927, for atrocious assault and battery;
(6) August 15, 1927, for robbery;
(7) December 4, 1927, for interfering with officer guarding still for Federal authorities;
[R. 1035] (8) December 9, 1927, for atrocious assault and battery, and fined $50;
(9) May 29, 1928, "open charge" (dismissed).[2]

[2] In the Amended Complaint, three additional arrests and charges were listed:

"11-11-1931—New York City, N.Y. as Joseph Rosen, No. B-98013. Violation Section 722 P.L. (Disorderly Conduct). On 12-24-31, Mgst. Gottlieb, 1st Crim. discharged.
9-8-1952—Indicted by the Extraordinary Grand Jury sitting in Saratoga County, N.Y., for crimes of Conspiracy and Forgery in the

Defendant, by amended answer, denied the May 29, 1928, arrest and charge and explained the December 4, 1927, arrest and charge.[3] As to the other arrests appellant admitted "he was either arrested or notified to appear before, a court or courts in the City of Newark, State of New Jersey, having jurisdiction over the offenses filed in said courts, charging Joseph or Joe Rosen or Joseph Stacher with the commission of the [said] offenses."

Appellant further raised the separate defenses that no cause of action was stated, res adjudicata, estoppel and laches, the Statute of Limitations, lack of jurisdiction over appellant because of his residence in a different jurisdiction (to-wit: Nevada) [R. 1036] at the time the complaint was filed and served (February 2nd and 3rd, 1953, respectively [4]), and inadequacy of the affidavit filed with the complaint. By pretrial motion, all separate defenses were stricken.

Appellant made a motion to quash, dismiss or transfer the case, upon ground of improper venue, which was denied after hearing. This issue was again raised at the trial and

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third degree ETC, see copy of letter from Department of Law, State of New York, dated November 6, 1952, in folder.

9-9-1952—Wanted: As Doc Stacher on teletype alarm by State Police, Saratoga, N.Y. —NZB—14251. (In Custody Ely, Nevada, and fighting extradition to New York State as of 1-13-1953)." (Appellee's Exhibit B.)

Appellant answers these matters by stating "they had no relationship whatsoever to the granting of defendant's petition for citizenship, as they had not occurred prior to that time." With this we agree.

[3] In his answer, appellant denied the December 4, 1927 charge and alleged on December 5, 1927 "two separate complaints were filed in said court in Newark, New Jersey, by the same complainant, charging this defendant as Joseph Rosen, with (a) violation of §3 of an Act Concerning Disorderly Persons, and (b) with attempted atrocious assault and battery; that no further proceedings were had as to the first of said charges alleging a violation of An Act Concerning Disorderly Persons and that as to the second complaint charging attempted atrocious assault and battery, defendant was adjudged guilty of the lesser offense of assault and battery and fined fifty dollars."

[4] The Return of Service shows personal service on defendant by leaving a copy with defendant's wife, Mrs. Miriam Stacher, at his residence, 721 North Beverly Drive, Beverly Hills, California.

extensive evidence was introduced by both sides. Again the court ruled that appellant, for the purposes of the Act under which he was here charged, "resided" within the Southern District of California.

The trial judge, by pretrial order pursuant to Rule 16, Federal Rules of Civil Procedure, ruled that evidence of specific acts or conduct would not be admissible at the trial to prove the good or bad character of defendant. However, he permitted the government to make an offer of proof for the record.[5]

After hearing the evidence, the court below continued the matter to permit each side to put in additional evidence and briefs, largely on the question of jurisdiction. Thereafter, the said court ordered judgment for the government. Appellant's counsel moved to set aside the submission of the case, to vacate the order for judgment and to re-open the case. This motion was granted. Voluminous additional testimony by deposition, and orally, was introduced by both sides. The court below thereafter re-submitted the case, and found against appellant by holding the government had established "by clear unequivocal and convincing evidence that the defendant under oath had stated he had no previous arrests," while in fact appellant had had "a prior criminal record."

The court further found with respect to the First Cause of Action, charging concealment, (a) that at the time he filed his petition for citizenship his name was Gdale Oistaczer, that he was known also as Joe or Joseph Rosen;[6] (b) that on September [R. 1037] 16, 1929, he signed his preliminary form for Petition for Citizenship and certified the statements therein were true;

> "Said Preliminary Form contained the printed question:
>
> '27. Have you ever been arrested or charged with violation of any law of the United States or state or any city ordinance or traffic violation?' And the an-

[5] This offer of proof became immaterial in view of the issues tried and the judgment rendered.

[6] Finding III.

swer in longhand was, 'No.', which answer was false, as the defendant well knew.'';

(c) that on January 22, 1930, after being sworn to tell the truth, appellant, when asked by Naturalization Examiner Braden if he had ever been arrested or convicted of a crime, answered "no"; that Braden "made a notation in his own handwriting on the reverse side of the triplicate copy of the defendant's Petition for Citizenship . . . 'Arr.: No' "; that appellant's said answer was false, as he well knew;[7] (d) that in the five years prior to appellant's petition, he had been arrested for or charged with the commission of a crime on eight occasions;[8] (e) that as a result of appellant's concealment of such material facts, the Immigration and Naturalization Service was prevented from making a full and proper investigation of appellant's qualifications for citizenship, and there resulted the Examiner's recommendation to the court that citizenship should be granted;[9] (f) that the necessary affidavit showing good and sufficient cause for the present action had been filed.[10]

Similar findings of fact, which amounted to wiiful misrepresentation on appellant's part, were made to support the government's second cause of action.

The court below concluded that the appellant's naturalization was procured by concealment of material facts and by wilful misrepresentation and revoked his citizenship.

Appellant subsequently moved for a new trial and to revise the Findings of Fact and Conclusions of Law. These motions were denied and this appeal followed.

[R. 1038] Thus the case was tried on two issues—was there jurisdiction over the appellant in this proceeding; and did appellant make false answers to the examiner's questions? The court below decided both issues in favor of the government. We will consider the two points.

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[7] Finding VI.

[8] Finding VII.

[9] Finding VIII.

[10] Finding IX.

I. *Jurisdiction in the District Court, Southern District of California Over the Appellant*

The government contended that appellant was a resident of California on February 2, 1953 (the controlling date), while appellant asserts he had been a resident of New Jersey for thirty-eight years prior to June, 1950, and of Nevada since June, 1950, up to and including February 2, 1953.

Section 340(a) of the Immigration and Nationality Act of 1952 provides that revocation proceedings shall be brought "in any court specified in subsection (a) of Section 310 of this Title, in the judicial district *in which the naturalized citizen may reside at the time of bringing suit.*" [Emphasis added.]

Section 310(a) vests "exclusive jurisdiction" to naturalize persons and provides that such jurisdiction "shall extend only to such persons *resident* within the respective jurisdiction of such courts." [Emphasis added.]

28 U.S.C., section 1391(b) provides:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where *all defendants reside.*" [Emphasis added.]

We accept appellant's position that there is an essential difference between "domicile" which generally involves intent, and "residence" which generally involves an actual place of abode. With this position the government agrees. We are then, not concerned with "intent."

The court passed on this issue at least twice; first, by way of denying defendant's motion to quash, denied June 30, 1953, and a second time, at the trial after additional evidence had been presented on the issue.

In determining the issue of jurisdiction, we must first recognize that it is a question of fact, to be determined by the trial judge. [R. 1039] Unlike the rule of law which governs us in the second phase of this case, here we are faced with the provisions of Rule 52(a), Federal Rules of Civil Procedure, which tell us that "Findings of fact shall

not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Further, the government was the prevailing party below, and hence we must take that view of the evidence most favorable to it. Appellee is entitled to the benefit of all favorable inferences from the facts proved relative to the issue of residence. If, when so viewed, there was substantial evidence to sustain the findings, then the judgment may not be reversed by this Court unless against the clear weight of the evidence or unless influenced by an erroneous view of the law. *Lewis Food Company of California v. Milwaukee Ins. Co.*, 9 Cir., 1958, F.2d – ; *John Hancock Life Ins. Co. v. Cohen*, 9 Cir., 1958, 254 F.2d 417, *United States v. First Trust Co. of St. Paul*, 8 Cir., 1958, F.2d ; *Elison v. Frank*, 9 Cir., 1957, 245 F.2d 837; *Vidales v. Brownell*, 9 Cir., 1954, 217 F.2d 136.

While there was evidence in the record to support a finding of non-residence in California on February 2, 1953,[11]

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[11] (a) Defendant, up to June 17, 1950, had resided in New Jersey. At that time he went to Reno, Nevada.

(b) In July, 1950, defendant purchased "an interest" costing roughly $91,000 in two corporations; the Bank Club of Reno, Inc. (50,000 shares) and Golden Securities Co. (250 shares).

(c) According to appellant's 1952 Income Tax Return, he sold these shares April 30, 1952. According to his tax attorney, one Burton, he sold his interest in the Golden Hotel (Golden Securities, Inc.) and the Bank Club of Reno in May, 1952. According to appellant's 1953 tax return, he sold the shares of the two corporations on April 30, 1953. The 1952 date is undoubtedly correct. Appellant received $86,000 cash, a one-third interest in the Earl Carroll Theatre Building in Hollywood, valued at $97,000, and "Installment Notes" of $1,166,000. At any rate, "early in 1952" and on May 1952, he moved to Las Vegas, although he frequently returned to Reno to collect on and watch his second and third purchase price mortgages on the hotel.

(d) While in Reno, he looked at houses to buy, but they "were too much money, and my wife wouldn't live there." Appellant lived at a Mr. Emmons' house, at the Golden Hotel, and at a Mr. High's house. He lived with High over a year, off and on.

(e) He had stayed at The Desert Inn in Las Vegas in May or June, 1951 and at various times prior to October 1952.

(f) He registered at The Desert Inn at Las Vegas on October 11, 1952. In evidence was his hotel bill, showing he remained in Room 132

there was equal, and in our opinion, a greater preponderance of substan- [R. 1040] tial evidence in the record to support the finding of residence in California on that controlling date.[12] We will not and cannot, [R. 1041] under

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from October 11th to 23rd; in Rooms 254-56 from October 24th to November 1st; in Room 254 from November 2nd to 15th; he was gone from November 16th to November 21st, inclusive; he stayed in Room 220 with Mrs. Stacher from November 22nd to November 28th; he was gone from November 29th to December 22nd, inclusive; he and Mrs. Stacher stayed in Rooms 106-8 from December 23rd to January 2, 1953; he was in Room 216 from January 3rd to January 20th; in Room 217 and 116-118 with Mrs. Stacher from January 20th to January 27th, 1953; and he was alone in Room 136 from January 27th to February 2nd, 1953.

(g) On February 2, 1953, he moved to El Rancho Vegas hotel, and was allegedly living there on March 28, 1953 (when he challenged the jurisdiction of this Court by affidavit) in a duplex bungalow he had leased for a year.

(h) In 1952 both Mr. and Mrs. Stacher had filed their 1951 Federal Income Tax Return listing the Golden Hotel, Reno, as their "home address."

(i) In 1953, their 1952 Federal Income Tax Return was filed, listing Hotel El Rancho Vegas, Las Vegas, as their "home address."

(j) In 1954, their 1953 Federal Income Tax Return was filed, listing Bungalow #505, Hotel El Rancho Vegas, Las Vegas, as their "home address."

(k) Mrs. Stacher visited Palm Springs in Southern California in 1952, and becoming pregnant and desiring the services of a certain obstetrician, temporarily rented a furnished house in Beverly Hills until the baby she was expecting was born. After the birth, she stayed until her teen-aged son could finish his school term. Appellant visited her at Palm Springs and Beverly Hills only occasionally.

[12] (a) Appellant left Newark, New Jersey, in June of 1950. At that time he owned a home in South Orange, New Jersey, at 215 North Wyoming Avenue.

(b) His business interests were in New Jersey. In 1951 he received (1) $12,775.00 as *wages* from Runyon Sales Co. of New Jersey, Inc., 123-125 Runyon Street, Newark 8, New Jersey; (2) $4,375.00 as *wages* from Runyon Games Co., 123 W. Runyon St., Newark, New Jersey; (3) $1,500.00 as *wages* from Harlew Agency, Inc., 1028 Broad St., Newark, New Jersey; (4) $5,950.00 as *wages* from Runyon Sales Co. of New York, Inc., 593 10th Ave., New York 18, N.Y. He received lesser *wages* from one or more of these companies in 1952 and none in 1953.

(c) He did not sell his home in New Jersey until April 23, 1953 after this suit was filed.

(d) He moved to Reno, Nevada, in June of 1950, but had no fixed

such circumstances and upon such a record, reverse the ruling of the trial court.

[R. 1042] II. *The Concealment and Misrepresentation*

Appellant made no attempt to deny seven of the eight arrests found as hereinbefore set forth or to deny his

residence in Reno, moving about between Emmons' house, the Golden Hotel, and Mr. High's home.

(e) Mr. Stacher made no explanation of where he lived from May 1, 1952 to October 11, 1952, when he registered at The Desert Inn at Las Vegas.

(f) He registered there, giving his address as "55 Runyon St., Newark, New Jersey." This was the address on his hotel bill on February 2, 1953 when he was served. He stayed at a daily rate.

(g) It was only *after* such service that he moved to Hotel El Rancho Vegas, Las Vegas, Nevada, registered as from Reno, Nevada, and paid a daily rate until March 18, 1953, when he went on a monthly rate.

(h) Mrs. Stacher went from Reno to Palm Springs. She visited Mr. Stacher at The Desert Inn in Las Vegas for three one-week periods in 1952 (October 24—November 1st; November 22nd—28th; December 23rd —January 2nd) and one week in January, 1953 (January 20th—27th), but lived in California or visited in the East the remainder of the time.

(i) At Palm Springs California, Mrs. Stacher leased a home at 478 Merito Place. Mr. Stacher did not sign the lease, but Mrs. Stacher signed for her husband and herself. Stacher alone was listed as lessee, and his address was given at 215 North Wyoming Avenue, South Orange, New Jersey. The term of the lease was from November 20, 1951 to May 20, 1952.

(j) Stacher admitted he had made two visits to his wife in Palm Springs, California, although the dates were unknown to him. "I lived there a little while," he said. He spent two months in Palm Springs, six weeks at one time—six visits altogether. Mr. High testified he had spent "a few months" with appellant at Palm Springs.

(k) The Palm Springs City Directory for 1952 listed Joseph Stacher at 478 Merito Place as a resident. This listing was *not* made by Stacher personally.

(l) The Telephone Directory for Palm Springs showed a listing for Joseph Stacher at 478 Merito Place, which had been requested November 19, 1951. This application was not signed by either Mr. or Mrs. Stacher, but by a real estate agent.

The Stachers apparently operated two automobiles—a Cadillac and a Mercury Sedan.

(m) On May 7, 1952, the Mercury was sold by a Palm Springs dealer to Joseph Stacher of 478 Merito Place, and a license issued on May 20, 1952, based upon an application signed by Joseph Stacher, under the statement:

"The undersigned hereby certifies all statements made either on the

failure to disclose [R. 1043] them in the course of his naturalization proceedings. His defense did not urge that inaccurate information had not been given the government, but that he was not responsible for the government having received such inaccurate information. Defendant maintained that no oral question was asked him concerning his

face of this application or the reverse side (h) hereof are true and correct to the best of his knowledge and belief."

Above this certificate, in answer to the blank, "Business or Residence Address:" there appeared "478 Merito Place," and above that the notation: "Resident, County of ," with "Riverside" inserted.

(n) On February 3, 1953, the 1953 registration was completed, showing the car registered to "Stacher, Joseph, 478 Merito Place, Palm Springs, California."

(o) Thereafter (and at a date subsequent to the disputed service), a change of residence to a new address, Hotel El Rancho Vegas, Las Vegas, was made.

(p) The Cadillac on March 14, 1952, was registered in the name of Miriam Stacher of 258 Goldsmith Avenue, Newark, New Jersey. On August 13, 1952, it was registered in California to:

"Name: Stacher, Miriam
Business of
Residence Address: 721 N. Beverly Dr., Beverly Hills, California."

And above that, "Resident, County of " with "Los Angeles" inserted.

(q) The 1953 registration for the Cadillac was originally issued to the same name and same Beverly Hills address.

(r) Appellant had a driver's license in New Jersey in 1951, and in California from 1952 to 1956.

(s) He never had a driver's license in Nevada.

(t) His California driver's license showed the Palm Springs address.

(u) The Beverly Hills address noted was that shown in Government's Exhibit 27, a lease signed April 10, 1952 covering the period May 15, 1952 to May 14, 1953, at the rate of $233.33 per month. The lessee is named as Joseph Stacher, both appellant and his wife signed it.

(v) On September 8, 1952, Mrs. Miriam Stacher entered the Cedars of Lebanon Hospital in Los Angeles for the birth of a child. The hospital records show her address to be 721 North Beverly Drive, Beverly Hills, California; nearest relative: Joseph Stacher; address: "same."

(w) Both Mrs. Stacher and appellant signed the consent to anesthesia required by the hospital.

(x) The telephone directory for Beverly Hills for February 1953 showed a listing to Joseph Stacher at 721 No. Beverly Drive, Beverly Hills.

(y) There was proof by affidavit that there was no telephone list-

arrest record; that the written answers were made on his behalf either [R. 1044] by his sister or his friend, Mr. Kemeny, now deceased; and that these should not bind him in this type of proceeding. The issue of his good moral character or the lack of it was not passed upon by the court below, although it was stipulated, subject to appellant's objection as to competency, that appellant appeared as a witness pursuant to a subpoena served upon him before the

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ing for Joseph Stacher in Las Vegas, Reno, Ely, Carson City, or Elko, Nevada, in 1952 or early 1953.

(z) On May 26, 1952 Joseph Stacher signed an application for domestic electric service with the Southern California Edison Company for the premises at "721 No. Beverly Drive, B.H." which had been applied for by mail on May 15, 1952. Not in appellant's handwriting, under the notation "additional information," appeared the following: "215 No. Wyoming Ave., South Orange, New Jersey, Tel. SO2-4796."

(aa) Mr. Stacher stated he spent about two months of the year at Beverly Hills, four weeks at one time, although the time was not identified. (By inference, it may have been between May 15, 1952 and October 11, 1952.) Appellant signed the hospital records on September 8, 1952, and Dr. Krahulik, the obstetrician, assertedly saw the defendant "in his Bevely Hills home" about a week after September 14, 1952.

(bb) Mrs. Stacher opened a bank account in Beverly Hills on November 11, 1952, which remained active into 1953.

(cc) The teen-age minor son opened a bank account in Beverly Hills on July 14, 1952. He attended Black Foxe Military Academy in Los Angeles from September 15, 1952 to June 12, 1953.

(dd) Mr. Stacher voted in New Jersey, but not in California or Nevada.

(ee) Appellant's only business in Reno, Nevada, after April 20, 1953 was seeing to payments on his "big second mortgage" on the Golden Hotel.

(ff) Appellant had no business in Las Vegas in 1953, has had none there, and had none there at the time of trial. He had no business anywhere at time of trial, but owned the second mortgage on the Golden Hotel in Reno and a third part of the Earl Carroll Theatre in Los Angeles, known as The Moulin Rouge.

(gg) In 1952 the State of New York started extradition proceedings against appellant to extradite him from Nevada. Nevada refused extradition on January 19, 1953. The United States Supreme Court granted certiorari on June 15, 1953, and reversed the refusal to extradite on December 7, 1953. Appellant then went to New York and settled the charges against him.

(hh) Mr. Stacher lived in Las Vegas, Nevada, until April of 1954 when he moved to Beverly Hills, California, where he lived and made his residence at the time of trial.

United States Special Committee to Investigate Organized Crime in Interstate Commerce, Senator Tobey presiding, and testified under oath on July 11, 1951, at Newark, New Jersey, and gave certain testimony which apparently raised serious questions as to his moral character and triggered an investigation into his citizenship and the institution of these proceedings.

The right of citizenship created by the Constitution is today more than ever a "priceless right,"[13] protected by the courts. As created by the Constitution that citizenship, so protected, applies both to those born in, and to those naturalized by, the United States.[14]

> "'[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.'"[15]

Thus, the status of the naturalized citizen is comparatively secure. But that citizenship may be voluntarily relinquished,[16] and the citizenship acquired by naturalization that is so carefully [R. 1045] protected by our courts is only that which has been *lawfully* acquired. Naturalization unlawfully procured can be set aside.[17] But in proceedings

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[13] Warren, C.J., dissenting in *Perez* v. *Brownell*, 1958, 356 U.S. 44, 78.

[14] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state in which they reside." U.S. Const., Amend. XIV, § 1, ch. 1.

[15] *Osborn* v. *Bank of the United States*, 1824, 22 U.S. (9 Wheat.) 737, 825.

[16] Act of July 27, 1868, 15 Stat. 223. *Nishikawa* v. *Dulles*, 1958, 356 U.S. 129; *Mandoli* v. *Acheson*, 1952, 344 U.S. 133. This voluntary relinquishment applies to citizens by birth as well as naturalized citizens. *Mackenzie* v. *Hare*, 1915, 239 U.S. 299.

[17] *Knauer* v. *United States*, 1945, 328 U.S. 654; *Baumgartner* v. *United States*, 1944, 323 U.S. 665; *Schneiderman* v. *United States*, 1943, 320 U.S. 118.

to set aside naturalization, although the proceedings are not criminal in their nature, the burden is on the government to prove the unlawfulness by clear, convincing, and unequivocal proof,[18] which does not "leave the issue in doubt."[19]

It is the duty of this Court, as an appellate tribunal, to examine the government's evidence to ascertain whether it meets this high standard of proof.[20] Unlike the usual case, the Supreme Court does "not accept even the concurrent findings of two *lower* courts as conclusive."[21] Nor can we here accept the finding of the one lower court as conclusive. We must come to our own conclusion as to the facts. But neither are we to assume, because the burden on the government is heavy in cases of this type (as the Supreme Court has pointed out), that we are required, or that the Supreme Court has intended, that we should, in the language of the trial court, "nullify Section 340 of the Nationality Act and permit an alien, by the concealment of material facts from the naturalization examiner, to obtain priceless citizenship."

We turn to the evidence on concealment and misrepresentation. We have read with care the voluminous record (1,030 pages) and examined some two score exhibits in evidence and a like number identified but not introduced. We have considered the difficulties inherent in proving in 1956 what happened in 1930, including the absence of certain witnesses. We have considered Stacher's version, and the testimony of the examiner, Braden, given on direct and under vigorous cross-examination, both at the trial (November 29, 1955) and by four depositions, two before trial (August 3, 1954, and October 19, 1955) and two after part of [R. 1046] the case had been tried (June 11, 1956, and July 23, 1956). We have considered the testimony and other evidence offered by each side in corroboration or

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[18] *Baumgartner* v. *United States*, *supra* note 17; *Schneiderman* v. *United States*, *supra* note 17.

[19] *Klapprott* v. *United States*, 1949, 335 U.S. 601, 612; *Knauer* v. *United States*, *supra* note 17.

[20] *Brenci* v. *United States*, 1 Cir., 1949, 175 F.2d 90, 82.

[21] *Knauer* v. *United States*, *supra* note 17, at 657.

impeachment of the other's case. As instructed by the Supreme Court, "we have considered the appraisal of the veracity of the witnesses by the judge who saw and heard them and have given it that 'due regard' required by the Rules of Civil Procedure 52(a)."[22] We have examined and reexamined certain of the documentary evidence in the case; and particularly, the Government's Exhibit 4 (the triplicate Form A-2214), denominated "Application for A Certificate of Arrival and Preliminary Form for Petition for Citizenship, U.S. Dept. of Labor, Naturalization Service," dated September 16, 1929. There were various marks on this document including check marks. These were markings in pencil and in ink on pages 1, 2 and 3. The witness Braden very carefully and precisely told the trial court which marks and what language he knew and recognized, and the marks and the language he did not recognize. Braden was not a partisan witness—he did not take sides. He didn't remember Stacher as an individual applicant, nor his answers. He did not know whether or not Stacher filled in the blanks, or even whether or not he signed his name. But he did positively and emphatically know that on page 3, the "Statement of Facts to be used in filing my Petition for Citizenship," he (Braden) (1) had put sixteen various check marks on that page 3 in blue pencil; (2) had written the word "Hebrew" over the word "white" after the question: "My race"; (3) had written the word "not" before "married" at question 5; (4) had added the word "not" in line 10; (5) had written the full first name "Joseph" before the word "Stacher"; (6) had put his own shorthand symbols "Cit OK" and "14 y." (meaning Handler was a citizen and had known the applicant fourteen years) opposite the name "Harry Handler," one of appellant's witnesses; (7) had crossed out "business salesman" and written in "garageman"; (8) had crossed out a witness' name; (9) had written in the name of the substitute witness, "Emil Kemeny, Interpreter, 299 Clinton Ave., Newark;"

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[22] *Id.* at 669.

and (10) had written over Kemeny's name "Cit. OK" and "10 yr."

[R. 1047] On page two of this Exhibit 4, question 27 reads:

> "Have you ever been arrested *or* charged with violation of *any* law of the United States *or* State *or* any city ordinance or traffic regulation?
> If so, give full particulars ." [Emphasis added.]

To the first question the answer "No" was written in.

In addition to the foregoing, a document was in evidence (Government Ex. 7) captioned on page 1 "Petition for Citizenship" of Gdale Oistaczer (Joe Stacher), and on page 2 "In the matter of the Petition of Gdale Oistaczer to be admitted as a citizen of the United States of America —Affidavit of Witnesses" (Harry Handler and Emil Kemeny). On the triplicate copy of the typewritten petition, everything shown in handwriting was in the handwriting of Braden, to-wit: (11) the date "1-22-30"; (12) the "G" indicating the recommendation to the court that sitizenship should be granted; (13) "W. E." indicating the witnesses were excused; (14) "B" being the Examiner, Braden's initial; (15) "May 12, 1930," the final hearing date (stamped in by rubber stamp); (16) "F.W.B.," the examiner's initials (stamped in by rubber stamp).

Thus the records established beyond doubt that Braden had acted as both the "designated examiner" on January 22, 1930, and "naturalization examiner" on May 12, 1930.

Under "Result of Examination" Braden *wrote* and *initialed* on May 12, 1930: (17) "Abs: No" to an alleged inquiry whether the applicant had been absent from the United States; (18) "Arr: No" to the alleged inquiry whether applicant had ever been arrested or convicted of a crime; (19) "Read: O.K." to the alleged test on whether applicant was able to read simple English; (20) "Eng: O.K." to indicate the applicant's understanding of the language and the examiner's ability to understand applicant's expression of it; (21) "Govt.: Fair" to indicate a fair knowledge of the form of government organization in

this country. This witness then added: "Change name —Joseph Stacher."[23]

[R. 1048] In contrast to the weight, as evidence, of this contemporaneously made memorandum of what happened in 1930, kept as part of the records of the Naturalization Service for a quarter of a century, and made by a person (now retired from Government service) in the regular performance of his designated duties (and interested only to the extent of insisting he had carefully and adequately performed those duties), stands the testimony of the applicant that he signed the application for citizenship, but *did not read it*; that Mr. Braden *did not ask him* if he had ever been arrested or convicted of any crime, or ever absent from the United States, or if he understood the principles of the organization of the government of the United States. Both Kemeny and Handler, appellant's two witnesses to his naturalization, had died before the trial. Kemeny died subsequent to September 1954 and in approximately October of 1955 after this case filed against appellant had been pending over two years.

Appellant produced in support of his unusual story (a) the testimony by deposition of his two sisters, one of whom states she answered the question respecting arrests; (b) the testimony of a retired County Detective, Louis Sklarey, to the effect that Stacher signed the application without reading it; (c) the testimony of Mrs. Kemeny, which added little; and, (d) the depositions of Julius Borger, George Golub, Morris Diamond and Joseph Friedlander, naturalized citizens examined by Braden, and Herman Isenberg, Julius Cassell, Morris Seigle, Leo Bateman, witnesses in naturalization proceedings wherein Braden had been examiner. None of these witnesses knew anything about Joseph Stacher's naturalization. Their testimony was apparently offered in rebuttal to Braden's testimony as

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[23] For an example of the weight such entries *may* carry, in a similar denaturalization case, see: *Corrado v. United States*, 6 Cir., 1955, 227 F.2d 780, 782, cert. denied 351 U.S. 925.

to his "invariable practice" of asking each applicant about any arrests. If Braden's testimony had rested entirely upon an "invariable practice," and there had not been written evidence that practice had been followed in this case, some of the testimony of these eight witnesses would have been of value to appellant's case. But Braden's testimony as to what was his invariable practice was backed up in this instance by written proof of what he had noted, and done, on the specific occasions here involved.

Furthermore, the testimony of these eight witnesses only in part supported rebuttal. It varied from Herman Isenberg's and Leo Bateman's and George Golub's positive statements that no [R. 1049] questions were asked concerning arrests, to Diamond's and Berger's and Seigle's uncertainty, and Friendlander's and Cassell's positive recollection of such questioning by Braden relative to arrests.

We need not discuss here the impression on the trial judge, which may or may not have been made, of a lack of complete candor in appellant's testimony. A witness usually has no difficulty, for example, in recognizing his own and or his wife's legible signature made in connection with a $10,000 transaction occurring within the previous five years.[24] This was a matter peculiarly and particularly for the trial judge to pass upon and to weigh it as he willed.

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[24] For example, appellant, as a witness, was questioned on cross-examination concerning the lease on the Beverly Hills house. The following colloquy took place:

"Q. (By the government): Mr. Stacher, I show you Government's Exhibit 27 for identification . . . and ask you if the name 'Joseph Stacher' was written in ink at the bottom of that exhibit is your signature?

A. This is Miriam and this is Joseph Stacher.

Q. Two signatures. One is Miriam Stacher and the other is Joseph Stacher. Now, I am asking you if the signature 'Joseph Stacher' was put on there by you?

A. Miss Martin, I don't know—I can't really say. I am here to testify to the best of my ability, yes. You showed me a lease which was made out by one of your investigators and you asked me if I signed it and it was 'Miriam Stacher and Joseph Stacher' on there and I didn't sign it.

[R. 1050] We conclude that the evidence is clear, unequivocal and convincing—evidence that does not leave the issue in doubt—that false answers were given by Stacher and on his behalf and in his presence, to the naturalization examiner, and that Stacher received his naturalization certificate illegally.[25]

I didn't know—I don't know now whether I signed it or not. I can't be sure, Miss Martin.

Q. You can't recognize your own signature?

A. I didn't say that Miss Martin.

Q. Can you recognize your own signature?

A. I can recognize—I am not sure that this is my signature or Mrs. Stacher's signature.

Q. I am only asking you at this moment if the writing 'Joseph Stacher' is your signature.

A. I am not positive. I am not sure. It might be my signature.

Q. Do you recall whether or not you were present at the signing of the lease for the Beverly Hills home?

A. I don't remember, Miss Martin.

* * * * * * *

Q. Do you know whether or not your wife signed the lease for the 'Miriam Stacher' is the signature of your wife?

A. I can't be sure, Miss Martin. This means an awful lot to me, my citizenship papers, Miss Martin, and I want to be sure.

Q. Do you know whether or not your wife signed the lease for this Beverly Hills house?

A. I don't know, Miss Martin.

* * * * * * *

Q. Did you ever have any conversation with her in regard to it?

A. The house?

Q. To the signing of the lease.

A. No, I don't think so, Miss Martin.

* * * * * * *

Q. Did she ever tell you she signed a lease for the house?

A. I don't remember, Miss Martin." [Tr. 688-690.]

[25] "Upon analysis, the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship. How could any Government official or witness say whether or not citizenship would have been denied appellant from an investigation of the various causes of his arrest, when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made. To be awarded

III. *Other Errors Urged*

The foregoing consideration of jurisdiction and the evidence to support misrepresentation and concealment covers appellant's points two, three and most of five.

Alleged error number one attacks the constitutionality of Section 340(a) of the Nationality Act of 1952. The premise of this [R. 1051] allegation is that § 340(a), in permitting judicial revocation of naturalization for "concealment of a material fact or wilful misrepresentation," changes the former basis for revocation contained in § 15 of the Nationality Act of 1906 (34 Stat. 601; 8 U.S.C. (1940 ed.) §405), under which appellant was naturalized, which provided for revocation "on the ground of fraud or on the ground that such certificate (of naturalization) was illegally procured."

"Fraud connotes perjury, falsification, concealment, misrepresentation." *Knauer v. United States*, 1946, 328 U.S. 654, 657. Under the prior provision, misrepresentation or concealment, with the requisite wilfulness or materiality, was sufficient to constitute fraud;[26] we are therefore satisfied as to the constitutionality of Section 340(a) as applied to appellant.

Alleged error four relates to objections to the introduction of evidence. We are satisfied no prejudicial error existed. Several exhibits attacked were not impeaching or

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citizenship in the United States exacts the highest standard of rectitude. Our Government should be afforded full opportunity for investigation of the moral character and fitness of an alien who seeks to be vested with all the rights, privileges and immunities of a natural born citizen of the United States. Where fraud has been practiced by the alien in procuring citizenship, it is not required that the Government in a denaturalization proceeding should meet the standard necessary for conviction in a criminal case. It will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship." *Corrado* v. *United States*, *supra* note 23, at 784.

[26] *Knauer* v. *United States*, *supra* note 17; *Johannessen* v. *United States*, 1912, 225 U.S. 227; *United States* v. *Montalbano*, 3 Cir., 1956, 236 F.2d 757, cert. denied, 352 U.S. 952; *Corrado* v. *United States*, *supra* note 23; *Brenci* v. *United States*, *supra* note 20; *United States* v. *Jerome*, S.D.N.Y., 1953, 115 F.Supp. 818; *cf. Luria* v. *United States*, 1913, 231 U.S. 9.

binding on defendant, but were admissible to show the *fact* of a lease, a telephone listing or a second lease, for whatever weight proof of such facts might have. Exhibit 27 (the original) cured any error relative to Exhibit 23 (copy of the lease) because Stacher *did* sign Exhibit 27. The weight and value of the other exhibits was subject to argument, but this did not make them inadmissible. The trial court repeatedly and carefully recognized this, and we find no error that was prejudicial, either in the introduction of evidence or in other rulings made by the lower court. An extended discussion of such alleged errors would not be helpful.

The judgment is *affirmed*.

(Endorsed:) Opinion. Filed July 15, 1958.

PAUL P. O'BRIEN,
Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JUDGMENT

[July 15, 1958, R. 1052.]

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered July 15, 1958.

PAUL P. O'BRIEN,
Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, September 11, 1958

Before: CHAMBERS and BARNES, Circuit Judges, and JERTBERG, District Judge

ORDER DENYING PETITION FOR REHEARING

[September 11, 1958, R. 1053.]

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant, filed August 14, 1958, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

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JAMES R. BROWNING, Clerk

No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSEPH STACHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 23–42) is reported at 258 F. 2d 112.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1958. A petition for rehearing was denied on September 11, 1958. The petition for a writ of certiorari was filed on October 14, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the courts below properly found that petitioner was a resident of California at the time the

suit for cancellation of his certificate of naturalization was instituted against him.

2. Whether Rule 4 (d) of the Federal Rules of Civil Procedure, prescribing the methods by which "personal service" may be effected, is applicable to the requirement of personal service in a denaturalization proceeding.

3. Whether the finding that petitioner intentionally and willfully misrepresented that he had never been arrested was supported by clear and convincing evidence.

STATUTES AND RULE INVOLVED

Section 101 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1101 (a) (33)) provides:

> (a) As used in this Act—
>
> * * * * * *
>
> (33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.

Section 340 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1451) provides in pertinent part:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in

subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *

(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Rule 4 of the Federal Rules of Civil Procedure provides in pertinent part:

* * * * * *

(d) *Summons: Personal Service.*—The summons and complaint shall be served together. The plaintiff shall furnish the person making

service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

* * * * * *

(e) *Same: Other Service.*—Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

STATEMENT

On February 2, 1953, a complaint was filed in the District Court for the Southern District of California seeking revocation of the certificate of naturalization issued to petitioner on May 12, 1930, by the District Court for the District of New Jersey, (R. 3–10, 154–161). After trial without a jury, the district court found that petitioner had made willful misrepresentations in the naturalization proceedings by denying that he had ever been arrested (R. 206–215). Judgment setting aside petitioner's naturalization pursuant to § 340 of the Immigration and Nationality Act of 1952, *supra*, pp. 2–3, was entered accordingly (R.

215–217).[1] The court of appeals affirmed (Pet. 23–42). The facts relevant to the issues presented here are as follows:

1: *Jurisdiction and venue.*—On February 3, 1953, when petitioner was in Las Vegas, Nevada, the complaint and summons were served upon him by leaving a copy with his wife at 721 No. Beverly Dr., Beverly Hills, California, which was alleged in the return on service of writ to be "the dwelling house and usual place of abode" of petitioner (R. 11–12). Petitioner moved to quash the service and to dismiss (or transfer) the action on grounds of improper venue, alleging that he was then a resident of Nevada for purposes of the venue and service provisions of § 340 (a) and (b) of the Act (R. 12–18). On the basis of affidavits filed by the parties (R. 18–39), the court found that petitioner resided in Beverly Hills and denied the motions (R. 40–41). The issue was renewed at the trial and extensive evidence was introduced. The evidence is set forth in detail in the court of appeals' opinion (Pet. 29–33, nn. 11–12). In main outline, it showed the following: In

[1] The amended complaint stated two "causes of action", one for concealment, and the other for misrepresentation, of material facts (R. 154–161). Both were sustained by the district court and affirmed by the court of appeals. However, since both claims were based on substantially identical facts and either claim is sufficient to support the judgment, the discussion in this brief will for convenience be limited to the "misrepresentation" claim.

The complaint also alleged concealment and misrepresentation of facts other than the petitioner's prior arrests (use of aliases and facts relating to moral character), but the district court made no findings on those allegations and they will not be discussed here.

June 1950, petitioner took his family from their home in New Jersey to Reno, Nevada (R. 680). In November 1951, petitioner and his wife leased a house for six months in Palm Springs, California (R. 255, 551–554, 697, 682). In April 1952, they leased for a year (at $10,000) the house in Beverly Hills, California, at which the service of process was made (R. 558–562, 688–694; Govt. Exh. 27). From November 1951 until the initiation of the instant proceeding, petitioner's wife and children resided continuously in California, first at the Palm Springs home and then at the Beverly Hills home (R. 553, 558–562). During this period petitioner spent at least two months each year with his family in California and spent the rest of his time in Nevada. In Reno, he stayed with friends and at hotels. In Las Vegas, to which he moved in May 1952, he stayed in varying rooms at the Desert Inn Hotel. Petitioner owned interests in business property in Reno and Hollywood, but had no business in Las Vegas. (Pet. 29–33). Petitioner admitted that he was residing in California at the date of the trial (R. 681).

2. In his answer to the complaint, petitioner admitted that he had been arrested seven times during a five-year period preceding his naturalization but claimed that he had not denied those arrests in the naturalization proceedings (R. 43–44).

The Government introduced into evidence the "Preliminary Form for Petition for Citizenship" filed by petitioner on September 16, 1929 (R. 413–414, Govt. Exh. 4). Question 27, which read, "Have you ever been arrested or charged with violation of any law of

the United States or State * * *?" was answered "No" in longhand and the form was signed by petitioner. Petitioner testified that one Emil Kemeny, who had advised and assisted him in obtaining his citizenship, had prepared the "Preliminary Form" for him and that he had signed it without reading it or knowing its contents (R. 669–670). Petitioner's sister testified, by deposition, that she had assisted Mr. Kemeny in preparing the "Preliminary Form" and had told him that petitioner had never been arrested (Zwillman, R. 355). A retired county detective testified, by deposition, that he had observed petitioner sign the "Preliminary Form" at the request of Mr. Kemeny without reading it (Sklarey, R. 386).

The Government also introduced into evidence the triplicate form of the "Petition for Citizenship" filed by petitioner (Govt. Exh. 7). In the space provided on the form under the heading "Result of Examination," there appeared in longhand the notations: "Abs: No. Arr: No. Read: OK. Eng.: OK. Govt: Fair.—F. W: B." F. W. Braden, the naturalization examiner who had conducted the examination of petitioner on January 22, 1930, testified that the notations were his and that the notation "Arr: No" meant that he had asked petitioner whether he had ever been arrested and that petitioner had answered "No" (R. 410). Although admitting that he had no personal recollection of petitioner's examination, he also testified that it was the consistent practice of himself and other examiners to ask applicants whether they had ever been arrested (R. 454).

Petitioner testified that in the oral examination before Braden, Bradgn had given him a reading test and had asked him various questions about the form of government but had not asked him whether he had ever been arrested (R. 672–673). A friend of petitioner who attended the examination testified, by deposition, that he heard Braden ask petitioner to identify his signature but that he could not "remember offhand" whether Braden asked any other questions (Bateman, R. 936). He "did not" hear Braden ask petitioner whether he had been arrested but he "would have heard" the question had it been asked (R. 936). On cross-examination, he admitted that he didn't remember whether petitioner was asked any questions other than his name (R. 941–945). Petitioner submitted seven depositions concerning questions asked of four other applicants in naturalization proceedings before Braden during 1929, 1930 and 1931. One applicant was directed by Braden to answer the question about arrests on the preliminary form and was orally questioned about the arrest he disclosed (Friedlander, R. 862, 868), but his witness heard no questions about arrests (Isenberg, R. 949, 956). One applicant was "positive" that he had not been asked about arrests (Golub, R. 920–921). Neither of the other two applicants (Diamond, R. 885, 887; Berger, R. 895–897) nor their witnesses (Cassell, R. 874; Seigle, R. 904–906) could remember whether the respective applicant was asked about arrests, although one of the witnesses (Cassell, R. 873) stated that he was himself asked whether he had been arrested.

In its findings of fact, the district court found that Braden had asked petitioner whether he had been arrested and that petitioner, knowing the answer to be false, had answered "No" (R. 209); that petitioner had signed the Preliminary Form knowing the answer to Question 27 (arrests) to be false (R. 209); and that petitioner's naturalization order was "procured by willful misrepresentation in that defendant in the proceedings which led to his naturalization intentionally and falsely represented that he had never been arrested" (R. 212). The court of appeals, after an extensive review of the evidence, found that "the evidence is clear, unequivocal and convincing—evidence that does not leave the issue in doubt—that false answers were given by Stacher, and on his behalf and in his presence, to the naturalization examiner, and that Stacher received his naturalization certificate illegally" (Pet. App. 40).

ARGUMENT

1. Petitioner contends that, at the time the complaint was filed and served, he was a resident of Nevada and not of the Southern District of California and hence the venue was improper and the service ineffective. The issue is solely one of determining on the particular facts, and in view of petitioner's divided contacts with California and Nevada, petitioner's principal place of abode in February 1953, and presents no issue appropriate for review by this Court.

a. Petitioner's contention that the courts below failed to apply the Immigration Act's definition of "residence" as the "principal, actual dwelling place in fact, without regard to intent" (§ 101, *supra*, p. 2) is

unfounded. To the contrary, both courts below expressly adopted that definition (R. 206–208; Pet. 19, 28) and found that petitioner's "principal, actual dwelling place" was the $10,000-a-year home he had leased in Beverly Hills—where his family lived and where he lived when he was not, for obscure reasons (see R. 257–258), in Las Vegas, Nevada—and not the numerous rooms at the Desert Inn Hotel in Las Vegas in and out of which he intermittently moved.

b. There is no merit to petitioner's argument, articulated for the first time in his petition for rehearing in the court of appeals, that the venue and jurisdiction of the court in a denaturalization proceeding must be established by the same standard of proof (clear, convincing, and unequivocal evidence) as is required on the merits to set aside the judgment of the court originally granting citizenship. That standard originated from the standard of proof required in equity to annul or reform a written instrument for fraud or mistake (see *Maxwell Land-Grant Case*, 121 U. S. 325, 381) and has its justification in the respect owing to a final court judgment; one who attacks a final judgment of a court must show its defect by more than a mere preponderance of the evidence. See *Schneiderman* v. *United States*, 320 U. S. 118, 135. Clearly, therefore, it is only to issues tending to impeach the judgment attacked that the more stringent standard applies, and there is nothing in the nature of a denaturalization proceeding that requires that the jurisdiction of the court in which the proceeding is brought be governed by standards of proof any different from those governing jurisdiction in any other kind of proceeding.

Petitioner draws support for his view from the dictum in *United States ex rel. Stabler v. Watkins*, 188 F. 2d 883, 885 (C. A. 2)—unsupported by a consideration of the origin or purposes of the doctrine—that "we can conceive of no reason for accepting less clear proof as to the court's jurisdiction" in a denaturalization proceeding than is required on the merits in such a proceeding. That case, however, is fully distinguishable on the facts. While Stabler was imprisoned in Michigan, a denaturalization proceeding was brought in New Jersey on the basis of an affidavit stating (p. 884) that the affiant had "been advised" by a Justice Department official "who purported to know of defendant and his whereabouts" that Stabler's last residence before his imprisonment was in New Jersey. Stabler did not appear in the action and a judgment of denaturalization was entered by default. When Stabler was later interned as an enemy alien, he brought a habeas corpus proceeding challenging the denaturalization order on the ground that his "last residence" had been in New York and not in New Jersey. The court held that the default judgment, based on a mere hearsay affidavit of residence, could be so attacked and remanded the case for a determination of Stabler's residence at the time of the New Jersey proceedings.

Whatever the apparent breadth of the court's dictum in *Stabler*, its holding was the limited one that a default judgment of denaturalization entered without clear proof of jurisdictional facts can be collaterally attacked by showing the lack of jurisdiction. The court's holding, indeed, was quite inconsistent

with petitioner's theory. Under petitioner's theory, the lack of clear proof of jurisdiction in the New Jersey proceeding would in itself have voided the New Jersey judgment and required that habeas corpus be granted. The court instead remanded the case for determination de novo of the issue of residence, thus requiring that the New Jersey judgment be given recognition unless Stabler established as a fact that he had not been resident in New Jersey. The court's holding was not that clear and convincing proof of residence was a jurisdictional prerequisite in naturalization proceedings, but only that the jurisdictional basis of a *default judgment* may be relitigated absent clear proof thereof in the defaulted proceedings. That decision, we submit, was based on considerations peculiar to the protection of the rights of citizenship against loss by default and very different from those governing the standard of proof in litigated cases.[2]

[2] In addition, it may be noted that in the *Stabler* case the objection was to the absence of competent proof even as to the evidentiary facts of residence. In this case, there is no significant dispute over the evidentiary facts as to petitioner's whereabouts or his contacts with the two jurisdictions and the only question is that of applying the statutory definition of residence to the established facts by characterizing the contacts with one of the jurisdictions as predominant. While that process of applying a legal standard to admitted facts is denominated for some purposes as a "fact" determination, it is not a question to which the "clear and convincing proof" standard may readily be applied. But whether or not that standard could be so applied, the most that the dictum in *Stabler* can be read as saying is that the evidentiary facts of residence must be shown by clear proof. Thus there is no conflict even if *Stabler* is given the broadest possible reading.

2. If petitioner was a resident of California, it follows, contrary to petitioner's final jurisdictional argument, that personal service was properly made upon him. Section 340 (b) of the Act requires that the defendant in a denaturalization proceeding be given "personal notice" of the proceedings and provides that if he is absent from the jurisdiction of his residence "such notice shall be given either by personal service upon him or by publication". (*supra*, p. 3). Rule 4 (d) of the Federal Rules of Civil Procedure provides in turn that personal service may be effected:

> Upon an individual * * *, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * *.

Service upon petitioner's wife at their residence in Beverly Hills clearly satisfied these requirements and constituted personal service upon petitioner.

3. On the merits, petitioner attacks the sufficiency of the evidence to support the findings below. Even accepting petitioner's explanation of the misstatement in the Preliminary Form signed by him (that he had not read it), there remains a single controlling issue of fact: whether in the oral examination Braden asked petitioner if he had been arrested and whether petitioner answered "No." Applying the standard of clear and convincing evidence (R. 803), the district court expressly found that the question had been so asked and so answered (R. 209). The court of appeals, aware of the heavy burden on it in reviewing

denaturalization orders and of the stringent standards to be applied, made an extensive review of the entire record and found the findings supported by clear, convincing, and unequivocal evidence which did not leave the issue in doubt (Pet. 31–40). Both courts properly discharged their functions and there is no occasion for further review of the evidence by this Court. That evidence, in all events, fully supports the judgments below.

Braden, a disinterested witness, testified that the notations made by him on petitioner's "Petition for Citizenship" meant that he had asked petitioner the questions and received the answers indicated, among them being the question concerning arrests. He testified in addition that, although he did not recall petitioner's examination, it was his consistent practice to ask those questions of applicants. The depositions of seven persons involved in other proceedings before Braden, offered by petitioner apparently to show departures by Braden from that practice, were patently inconclusive (see the Statement, *supra*, p. 8). In substance, the only evidence offered by petitioner to overcome Braden's testimony and the contemporaneous memorandum of the proceeding made by Braden was petitioner's own self-serving denial that he had been asked the question. Petitioner's credibility and the weight to be given to his testimony were matters for the trial judge to appraise, and his rejection of petitioner's testimony was obviously justified. Indeed, apart from his denial that he was asked about prior arrests, petitioner's testimony tended to corroborate Braden's, for it confirmed that Braden had in fact

examined him on at least two of the five matters reflected in Braden's notations.[3]

Petitioner's attempt to inject into the case a separate issue of willfulness is without merit. If petitioner, with seven admitted arrests within the preceding five years, answered "No" to a question whether he had ever been arrested, the answer was necessarily knowingly false and a willful misrepresentation, as the district court expressly found. Similarly, since the district court found that petitioner's naturalization had been procured by a willful misrepresentation—*i. e.*, "fraud," which was admittedly a ground for denaturalization at the time petitioner was naturalized—the question whether the 1952 Act authorizes denaturalization for unintentional concealment, and if so whether it is constitutional, is not presented.

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[3] The five notations made by Braden under "Result of Examination," as translated by Braden (R. 410–411), were: (1) Absent from country since arrival?—No; (2) Arrests?—No; (3) Read—O. K.; (4) Speak English—O. K.; and (5) Knowledge of government—Fair. Petitioner testified that Braden had asked him to read a printed card and had asked him various questions about the government (R. 672–673). The appraisal of petitioner's English-speaking ability, of course, did not require a question, and petitioner was not specifically asked, in the trial of this case, whether Braden had inquired about absences from the country. Thus the only conflict in the testimony was over the specific question concerning arrests.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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